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## Civil Rico: Pleading Fraud for Treble Damages

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# CIVIL RICO: PLEADING FRAUD FOR TREBLE DAMAGES

**Bart Dzivi**

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## I. INTRODUCTION

Title IX of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, (RICO),<sup>1</sup> was a far-reaching attempt by Congress to wage war on organized crime. Included in the RICO arsenal are a variety of both civil sanctions and criminal penalties. Congress, in an attempt to snare would-be Vito Corleones, enacted laws that authorize attorney's fees and treble damages for practically any claim in which fraud can be proven.<sup>2</sup>

To invoke either the civil sanctions contained in 18 U.S.C. § 1964<sup>3</sup> or the criminal penalties located in 18 U.S.C. § 1963,<sup>4</sup> it must

1. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982)).

2. RICO is not limited in scope to claims arising from acts of fraud. Fraud simply encompasses a great number of activities and is at the root of most of the current civil RICO litigation.

3. 18 U.S.C. § 1964 (1982).

be established that the defendants engaged in conduct which is prohibited by 18 U.S.C. § 1962.<sup>6</sup> The activity which is proscribed by section 1962 is that a "person" shall not have a relationship "through" or "from" a "pattern of racketeering activity" with an "enterprise."<sup>7</sup>

The elements of "person," "enterprise," and "pattern of racketeering activity" are all broadly defined in section 1961.<sup>8</sup> Racketeering activity is any act in the laundry list of state and federal crimes, which in RICO jargon are known as predicate offenses.<sup>9</sup> A

4. 18 U.S.C. § 1963 (1982).

5. 18 U.S.C. § 1962 (1982).

6. 18 U.S.C. § 1962 (1982). Private plaintiffs virtually ignored the civil remedy provisions of RICO until the late 1970's. The only two reported cases prior to 1978 are *King v. Vesco*, 342 F. Supp. 120 (N.D. Cal. 1972); and *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975).

All but one of the opinions issued in RICO suits are responses to various pretrial motions. See *infra* note 14. A few cases have proceeded to the appellate level. The Ninth Circuit Court of Appeals has issued one opinion in a civil RICO suit. See *infra* note 31. The United States Supreme Court has addressed RICO issues twice, both in the criminal context. *United States v. Turkette*, 452 U.S. 576 (1981); *United States v. Russello*, 104 S. Ct. 296 (1983).

7. 18 U.S.C. § 1961 (1982) provides in part:

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.

8. 18 U.S.C. § 1961(1) (1982) provides:

(1) "[R]acketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any

pattern can be established by showing that the two predicate offenses occurred within a ten-year period.<sup>9</sup> Person and enterprise are both defined broadly enough to include any private, business, or governmental entity.<sup>10</sup>

The focus of this comment is the developing body of law pertaining to the application of the civil remedy provisions of RICO. Section 1964 states that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."<sup>11</sup> A civil RICO plaintiff need not allege any prior criminal conviction and may establish a case by a preponderance of the evidence.<sup>12</sup> RICO also contains a liberal construction clause which mandates that RICO be broadly construed in order to accomplish its purposes.<sup>13</sup>

Civil RICO is just beginning to undergo judicial scrutiny. Only one RICO suit has gone to judgment.<sup>14</sup> Judges are generally split into two camps: those who dismiss complaints because of an underlying belief RICO should only apply to gangsters, and those who deny motions to dismiss because the language of RICO is extremely broad.<sup>15</sup>

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act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

9. 18 U.S.C. § 1961(5) (1982).

10. For a discussion of the definition of person, see *infra* text accompanying notes 17 to 39. For a discussion of the definition of enterprise, see *infra* text accompanying notes 89 to 108.

11. 18 U.S.C. § 1964(c) (1983).

12. *E.g.* *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979). *But see* G. Strafer, R. Massumi & H. Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 715-18 (1982) [hereinafter cited as *Public Interest*]. The authors make a compelling argument for imposing a "clear and convincing" standard of proof in civil RICO suits.

13. *Racketeer Influenced and Corrupt Organizations*, Pub. L. No. 91-452, § 904, 84 Stat. 947 (1970).

14. *Hirsch v. Enright*, 577 F. Supp. 339 (D.N.J. 1983).

15. For a sample of recent cases which adopt the restrictive view, see, *Kaufman v. Chase Manhattan Bank*, [Current] FED. SEC. L. REP. (CCH) ¶ 99,678 (S.D.N.Y. Feb. 15, 1984); *Dakis v. Chapman*, 574 F. Supp. 757 (N.D. Cal. 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983). Cases that adopt a literal interpretation include *Swanson v. Wabash, Inc.*, No. 83-0459 (N.D. Ill. Dec. 16, 1983); *Austin v. Merrill Lynch, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983); *Ralston v. Capper*, 569 F. Supp. 1575 (E.D. Mich. 1983); *Gil-*

RICO does not appear to have been separated into discrete elements universally recognized by courts and commentators.<sup>16</sup> In order to state a RICO claim for treble damages, this author believes there are ten separate elements under sections 1964, 1962 and 1961. There must be (1) a person-victim (2) injured in business or property (3) by reason of (4) a person-defendant (5) from or through (6) a pattern (7) of racketeering activity (8) having a relationship with—i.e., investing racketeering proceeds in, controlling, working, or associating in the affairs of (9) an enterprise (10) which is involved in interstate commerce.

## II. THE ELEMENTS OF A SECTION 1962 VIOLATION

### A. A Person-Defendant

It is necessary to show that a violation of section 1962 occurred before a plaintiff can recover treble damages under section 1964. One of the elements of a section 1962 violation is that some "person" engaged in the proscribed conduct. Natural persons, corporations, and even the estate of a decedent are persons for the purposes of RICO.<sup>17</sup> Because of the broad definition of "person" in section 1961(3), one might think that this would not be vigorously disputed.

Two theories have been used with limited success to show that plaintiffs have not satisfied this element. In one line of cases, defendants have prevailed by arguing that it is improper to allege that an entity is both the "person" and the "enterprise."<sup>18</sup> Some courts have also held that "person" includes only participants in organized crime.<sup>19</sup>

Some district courts have, in effect, changed the language of the statute to mean any person connected with organized crime.<sup>20</sup>

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bert v. Bagley, [Current] FED. SEC. L. REP. (CCH) ¶ 99,483 (M.D.N.C. Sept. 7, 1982).

16. The Second Circuit has however recently stated that there are seven elements to a violation of section 1962. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir.), *petition for cert. filed*, 52 U.S.L.W. 3473 (U.S. Dec. 8, 1983) (No. 83-950). A civil plaintiff must also establish that the requirements of section 1964(c) are satisfied in order to recover damages.

17. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 676 (N.D. Ind. 1982).

18. *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 357 (E.D. Mich. 1983).

19. The organized crime nexus was first set forth in *Barr v. WUI/TAS*, 66 F.R.D. 109 (S.D.N.Y. 1975). This original rejection of civil RICO has been cited with approval or been implicitly adopted by district courts that refuse to accept the prevailing view. *See, e.g.*, *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981).

20. Or perhaps, as Professor Blakey put it, "The defendants in *Bennett*, in effect, asked the court to redraft § 1964(c) as follows: 'Any person [injured by organized crime] in

Typically, those courts have based their interpretation on the "expression of congressional purpose to deal with organized crime's control over business."<sup>21</sup> There are a number of policy considerations that support such an interpretation. The standard floodgates argument has been used by defendants,<sup>22</sup> courts<sup>23</sup> and commentators<sup>24</sup> who call for restriction of RICO. Others have also stated that private plaintiffs have other remedies under state and federal law based on the defendant's commission of the predicate act upon which the RICO claim is based.<sup>25</sup> It has even been suggested that an expanding use of RICO's civil remedy provisions would impede enforcement of its criminal sanctions.<sup>26</sup> The common undercurrent expressed or implied in the cases restricting application of RICO civil remedies is the notion "that RICO should apply only to ac-

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his business or property . . . may sue therefor . . . ' The italicized words, of course, do not appear in the statute as drafted by Congress." Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 285 n.145 (1982) [hereinafter cited as Blakey, *Reflections*]. This excellent article is the most thoroughly documented and comprehensive review of a topic that has undergone rigorous scrutiny by numerous commentators. Professor Blakey is currently working on a treatise on RICO to be published in 1984.

Professor Blakey is also given credit for the actual drafting of RICO during his tenure as Chief Counsel of the Senate Subcommittee on Criminal Law and Procedures of the United States Senate. Other articles on various aspects of civil RICO include: Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage Remedy*, 14 TEX. TECH L. REV. 377 (1983); Parrish, *RICO Civil Remedies: An Untapped Resource for Insurers*, 49 INS. COUNS. J. 337 (1982); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982); Comment, *Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100 (1981); Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980) [hereinafter cited as Blakey & Gettings, *Basic Concepts*].

21. Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); cf. Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (The Act "was aimed not at legitimate business organizations but at combating 'a society of criminals . . .'"); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746 (N.D. Ill. 1981) ("[T]he conduct complained of here is so far removed from the purposes of the legislation that it is not within the ambit of the statute.").

22. See, e.g., Schacht v. Brown, 711 F.2d 1343, 1355 (7th Cir.), cert. denied, 104 S. Ct. 509 (1983).

23. E.g., Waterman S.S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981).

24. E.g., Patton, *supra* note 20, at 431 (pointing out that practically all commercial claims contain facts that would support a treble damages RICO claim).

25. Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981). This policy argument may hold some weight in a securities context, but the commonly alleged predicate acts of wire and mail fraud do not contain a private remedy. See Ryan v. Ohio Edison Co., 611 F.2d 1170, 1178 (6th Cir. 1979); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974), cert. denied, 423 U.S. 837 (1975).

26. Letter from William J. Fitzpatrick, General Counsel of Securities Industry Association, to Department of Treasury (October 20, 1983).

tions involving organized crime activities, and not to everyday civil actions . . . ."<sup>27</sup>

There are, of course, policy considerations that favor the liberal interpretation of RICO. One reason offered is that other remedies have not been effective in slowing the multi-billion dollar drain on the economy caused by fraud.<sup>28</sup> While legislative history is also somewhat persuasive,<sup>29</sup> the most convincing argument is that the language of RICO is entirely barren of any reference to organized crime. Thus, the prevailing view rejects the requirement that the defendant be linked to organized crime.<sup>30</sup>

The other approach defendants have used with some success is to claim that the plaintiffs have not adequately alleged a violation of section 1962 because the person-defendant is the same entity as the enterprise. In *Rae v. Union Bank*,<sup>31</sup> the Ninth Circuit Court of Appeals held that an entity may not be both the defendant and the enterprise. The court did not elaborate on its reasons for doing so, but simply adopted a statement made by the Fourth Circuit in a criminal RICO prosecution.<sup>32</sup>

The Eighth Circuit dismissed a count of a complaint in which "an 'enterprise' was not alleged apart from the 'person' who was

27. *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981).

28. See Blakey, *Reflections*, *supra* note 20, at 342-47.

29. For example, Congress had considered an amendment which made a link to organized crime an element of RICO, but members of the House rejected the amendment because some expressed the fear that such a limitation would create an unconstitutional status offense. 116 CONG. REC. 35,343-46 (1970).

For a much more extensive discussion of the legislative history of RICO see either Blakey, *Reflections*, *supra* note 20, at 249-80 or *Public Interest*, *supra* note 12, at 681-85.

30. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21 (2d Cir.), *petition for cert. filed*, 52 U.S.L.W. 3473 (U.S. Dec. 8, 1983) (No. 83-950); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 177 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

31. *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984). See also *Willamette Sav. & Loan v. Blake & Neal Finance Co.*, No. 82-1507-PA, (D. Or. Jan. 6, 1984); *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982); *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020, 1024 (S.D. Ohio 1982); *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 357 (E.D. Mich. 1983); *In re Longhorn Sec. Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983). But see *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 233 (M.D. Pa. 1982); *Mooney v. Fidelity Union Bank*, No. 82-3192 (D.N.J. March 22, 1983). In *Mooney*, the court adopted the rationale of *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815, 834 (1983), a criminal prosecution involving a scheme to defraud the government by providing nonconforming goods in which the court held a corporation may be named simultaneously as a person and an enterprise.

32. *United States v. Computer Services, Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983).

'associated with' an enterprise."<sup>33</sup> One of the defendants was JKV, the corporation that owned and operated a life-care retirement facility. The plaintiffs alleged a scheme to defraud the residents in which JKV was the entity, and in addition to other relief sought reorganization of JKV.<sup>34</sup> By seeking such relief, the plaintiff put JKV in the role of "the 'person' responsible for conducting the affairs of an enterprise . . . ."<sup>35</sup>

In his dissent from the en banc majority opinion, Judge McMillian concluded a corporation could "simultaneously be both a person and an enterprise under RICO."<sup>36</sup> The dissent relied in part upon the article by Professor Blakey<sup>37</sup> that criticized the analysis of the first Eighth Circuit opinion in *Bennett*.

In the context of a criminal case, the United States Supreme Court has stated that the separate elements of "enterprise" and "pattern of racketeering activity" may be established by the same proof.<sup>38</sup> One might argue this provides support for the theory that a "person" and an "enterprise" may sometimes be the same entity. Until the Court faces this issue in a civil RICO suit, a prudent practitioner should be able to avoid this problem by carefully drafting the complaint.<sup>39</sup>

## B. *From or Through, a Pattern of, Racketeering Activity*

### 1. *Racketeering Activity*

To establish a violation of section 1962, a plaintiff must prove that the conduct complained of amounted to racketeering activity. Racketeering activity is very broadly defined in section 1961. The

33. *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361, 1365 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983). The district court dismissed two counts of the RICO claim. The panel decision reversed the district court as to one count and affirmed as to the other count. The en banc court reached the same conclusion as the panel.

34. *Bennett v. Berg*, 685 F.2d 1053, 1057 (8th Cir. 1982).

35. *Id.* at 1061.

36. *Bennett v. Berg*, 710 F.2d 1361, 1365 (8th Cir. 1983) (en banc) (McMillian, J., dissenting in part).

37. *Id.* at 1365-66. Professor Blakey stated that in situations "where the enterprise is a 'prize' or 'victim'" of the scheme, the purpose of RICO would not be served by imposing either civil or criminal sanctions. But when the enterprise is a "perpetrator" or even in some instances an "instrument" in the scheme, "the remedial purposes of RICO tip the judgment toward finding civil liability . . . ." Blakey, *Reflections*, *supra* note 20, at 323-24.

38. *United States v. Turkette*, 425 U.S. 576, 583 (1981).

39. In *Bennett*, 685 F.2d 685 F.2d at 1062-63, the court suggested that if the plaintiff had expressly pleaded the retirement facility was the enterprise and the corporation was the person, the issue could have been avoided. In most situations it should be possible to find separate entities for the separate requirements.



predicate acts<sup>40</sup> include an exhaustive list of state and federal crimes.<sup>41</sup> A pattern is established by showing that at least two predicate acts occurred, the second act within ten years of the first.<sup>42</sup> Some courts have held that the word "through"<sup>43</sup> adds an additional requirement of a relationship between the enterprise and racketeering activity.<sup>44</sup>

Some of the more common offenses that may give rise to a civil RICO claim are mail fraud, wire fraud, and fraud in the sale of securities.<sup>45</sup> These particular predicate acts are also quite broadly defined.<sup>46</sup> Courts have held that an allegation was sufficiently stated for mail fraud, even though the communications were sent only among defendants and third parties;<sup>47</sup> and for fraud in the sale of securities where the fraud was allegedly committed by the purchaser.<sup>48</sup>

A recent decision by the Second Circuit, *Moss v. Morgan Stanley Inc.*,<sup>49</sup> shows that a situation that clearly contains the necessary facts must be properly pleaded, or the case may be dis-

40. "Predicate acts" is the synonym widely used by courts and commentators for offenses contained in the definition of racketeering activity. One explanation for this usage is given in Parrish, *supra* note 20, at 240 n.15, where the author suggests that a prudent plaintiff avoid drafting complaints that bring forth an image of a racketeer or gangster defendant.

41. 18 U.S.C. § 1961(1) (1982). For text of statute, see *supra* note 8.

42. 18 U.S.C. § 1961(5) (1982). For text of statute, see *supra* note 7.

43. See *infra* note 62.

44. *Schacht v. Brown*, 711 F.2d 1343, 1355 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983).

45. 18 U.S.C. § 1961(1) (1982).

46. *E.g.*, *Salisbury v. Chapman*, 527 F. Supp. 577, 579 (N.D. Ill. 1981). (In a RICO claim, the plaintiff must establish the existence of "(1) a scheme to defraud; and (2) use of the mail in furtherance of that scheme."). These elements of fraud require proof of specific intent to defraud. *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980).

Whether or not RICO requires an additional mental state beyond that which is contained in the predicate act is an unsettled question. One court held RICO does not require proof of an additional "scienter element." *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). That interpretation was later questioned in *United States v. Bledsoe*, 674 F.2d 647, 661 (8th Cir. 1982). Perhaps the cases may be distinguished on the basis that *Bledsoe* involved a violation of RICO conspiracy, section 1962(d), and *Boylan* involved a violation of section 1962(c). For a more sophisticated analysis of this issue, see Blakey, *Reflections*, *supra* note 20, at 295-96 n.151. See also *Austin v. Merrill Lynch, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983).

One commentator has stated that "garden variety deceptive conduct by the most up-standing white collar-types almost invariably involve[s] mail and wire fraud violations." Parrish, *supra* note 20, at 343.

47. *D'Iorio v. Adonizio*, 554 F. Supp. 222, 229 (M.D. Pa. 1982).

48. *Spencer Cos., Inc. v. Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,361, at 92,214 (D. Mass. Nov. 17, 1981).

49. 719 F.2d 5 (2d Cir.), *petition for cert. filed*, 52 U.S.L.W. 3473 (U.S. Dec. 8, 1983) (No. 83-950).

missed.<sup>50</sup> In *Moss* a defendant was eventually convicted on criminal charges of mail fraud.<sup>51</sup> The complaint alleged only a 10(b)-5 violation<sup>52</sup> based on trading on insider information. When the court held as a matter of law that the defendant had not violated that specific provision,<sup>53</sup> it dismissed the complaint even though the defendant's "prior conviction for mail fraud, as well as security fraud . . . could provide the proof of the predicate acts of 'racketeering' that is presently absent from the complaint."<sup>54</sup>

## 2. Pattern

The plaintiff must allege that the racketeering activity occurred in a "pattern." This requirement that *two* predicate acts be committed within a ten-year period should not ordinarily present a significant problem in obtaining standing to allege a RICO count in a civil fraud action. The prevailing viewpoint appears to be that a series of individual mailings<sup>55</sup> or a series of fraudulent statements concerning a security<sup>56</sup> delivered as part of a single plan are independent violations sufficient to satisfy the pattern requirement. There was, however, one case in which the district court held that multiple bribes pursuant to one plan to rig a vote regarding a cable TV franchise were not distinct predicate acts.<sup>57</sup>

Civil plaintiffs may have to plead that the two predicate acts were related by a common plan in order to satisfy the "pattern" requirement. Although this issue has apparently not been discussed in the civil context of RICO, it has been raised a number of times in criminal cases. The Ninth<sup>58</sup> and Seventh<sup>59</sup> Circuits have

50. *Id.* at 17.

51. *Id.* at 9 n.6. Collateral estoppel should be available, if properly pleaded, to prevent a defendant convicted of a crime from relitigating those facts. See *Anderson v. Janovich*, 543 F. Supp. 1124 (W.D. Wash. 1982); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 644 (D. Alaska 1982); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 682-83 (N.D. Ind. 1982). Conversely, collateral estoppel has been used to prevent a plaintiff from bringing a RICO claim when the same facts were the basis of a civil securities fraud suit. *Berns v. O'Dell*, 563 F. Supp. 1201 (E.D. Mo. 1983), *aff'd per curiam*, No. 83-1750 (8th Cir. Feb. 1, 1984). Cf. *County of Cook v. MidCon Corp.*, 574 F. Supp. 902, 913-19 (N.D. Ill. 1983) (litigation in state courts prevented relitigation of issues in federal court).

52. 15 U.S.C. § 78j(b) (1982); 17 C.F.R. § 240.10b-5 (1983).

53. *Moss*, 719 F.2d at 14.

54. *Id.* at 19 n.15.

55. *Erlbaum v. Erlbaum* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772, at 93,921 (E.D. Pa. July 13, 1982). See *infra* note 86.

56. *Spencer Cos., Inc. v. Agency Rent-A-Car, Inc.*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,215-16 (D. Mass. Nov. 17, 1981).

57. *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981).

58. *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 103 S.

stated that the "pattern" is established by showing that the predicate acts were connected to each other. The Second<sup>60</sup> and Fifth<sup>61</sup> Circuits have stated that predicate acts do not need to be interrelated. Since the plain language of RICO contains no common scheme requirement, it would appear to be proper not to create such a limitation.

### 3. *Nexus Between Racketeering Activity and Enterprise*

The word "through" is apparently an element necessary to show a violation of section 1962.<sup>62</sup> It requires allegation and proof of a nexus between the predicate acts and the enterprise.<sup>63</sup> In *Schacht v. Brown*,<sup>64</sup> the court stated "that neither common law fraud nor securities law violates [sic] will, by themselves, be automatically eligible for redress through a civil RICO action; there is an additional requirement under section 1964(c) . . . that an interstate enterprise be conducted 'through' a pattern of such activity."<sup>65</sup>

In *Schacht*, the defendant was the parent corporation of the enterprise-subsiary. The suit was brought by the receiver of the insolvent enterprise-subsiary. The alleged predicate acts were acts of mail fraud committed by the defendant-parent on the state insurance regulators in an effort to loot the enterprise-subsiary. The complaint alleged violation of section 1962(a) and (c).<sup>66</sup> The

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Ct. 1194 (1983).

59. *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981).

60. *United States v. Weissman*, 624 F.2d 1118, 1122-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

61. *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

62. 18 U.S.C. § 1962(b) and (c) both contain the phrase "through a pattern of racketeering." It is also apparently an element of subsection (d), which prohibits any conspiracy to violate subsection (a), (b), or (c). Subsection (a), dealing with the "RICO investor," prohibits persons from investing in an enterprise with "any income derived, directly or indirectly from a pattern of racketeering activity. . . ." (emphasis added).

63. Whether the nexus requirement is the same for each subsection is not clear. In all of the cases discussed in this part of the comment, the discussion of nexus was raised in the context of § 1962(c). In *Schacht v. Brown*, 711 F.2d 1343, 1360 n.22 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983), the court did state that the nexus requirement for subsection (d) was the same as for subsection (c).

64. 711 F.2d 1343 (7th Cir. 1983).

65. *Id.* at 1355.

66. *Id.* at 1358-59. The court addressed this issue in response to the defendant's assertion that there was no "competitive injury." This requirement, adopted first in *N. Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980), is an attempt to withdraw the protection of RICO from persons injured directly by the predicate act, and limit the recovery to those indirectly injured (i.e. customers or competitors of the enterprise). For a further elaboration of a "competitive injury" requirement, see *infra* text accompanying

court stated that the instant case was a clearer example of an injury brought about through the predicate acts than the cases<sup>67</sup> "in which the plaintiff corporations were damaged by a scheme of bribes and kickbacks conducted *through* the plaintiff corporation, thus entailing financial losses which stemmed directly from the commission of the predicate offenses."<sup>68</sup>

Another example of an argument based on this nexus requirement is contained in a case where the defendants allegedly bought stock in an entity and later committed the offenses.<sup>69</sup> The defendants argued that the acquisition was independent of and not conducted "through" the predicate acts. The district court rejected the defendants' "unduly restrictive" interpretation of the word "through" and adopted the rationale contained in a prior criminal RICO case that required the enterprise to be connected either to the defendant by his position in the enterprise, or to the racketeering activities.<sup>70</sup>

### C. *The RICO relationship*

Every violation of section 1962 requires proof of a certain relationship between the person-defendant and the enterprise. The type of relationship that the defendant has with the enterprise would determine which subsection of section 1962 would be proper to allege. Subsection (a) proscribes investment of racketeering proceeds, to establish or operate an enterprise. Subsection (b) proscribes the acquisition of or control of an enterprise. Subsection (c) proscribes an employee or associate from conducting or participating in the affairs of an enterprise. Subsection (d) proscribes conspiring to violate subsection (a), (b), or (c).<sup>71</sup>

Section 1962(c) seems to be the most frequently alleged claim.<sup>72</sup> The two requirements of RICO that are peculiar to this

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notes 115-28.

67. *Computer Terminal Systems, Inc. v. Gross*, 1982-1 Trade Cas. (CCH) ¶64,531 (E.D.N.Y. 1981); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981).

68. *Schacht*, 711 F.2d at 1359 (emphasis in original).

69. *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] Fed. Sec. L. REP. (CCH) ¶ 98,742 (N.E. Ohio June 11, 1982).

70. *Id.* at 98,738-39. The court adopted the test announced in *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). A criminal RICO case that interprets provisions applicable to both civil and criminal cases (i.e., those contained in § 1962) should be dispositive authority. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576 (1981) (interpreting the scope of "enterprise").

71. 18 U.S.C. § 1962 (1983).

72. This author is aware of 16 appellate cases addressing a civil RICO issue, six specifically addressing violations of 1962(c): *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 (6th Cir. 1982); *Bennett v. Berg*, 685 F.2d 1053, 1060 n.8 (8th Cir. 1982), *aff'd on*

subsection ("conduct or participate" in an enterprise's affairs, and "employed by or associated with any enterprise") have been specifically addressed by few courts facing a civil RICO claim.

There is no clear line of demarcation as to which acts constitute participation or conduct in the affairs of an enterprise, but "RICO does not apply where the charged enterprise provides only a setting for racketeering activities wholly unrelated to its own purposes and affairs."<sup>73</sup> In one case the defendants had argued that this requirement was not satisfied because the enterprise's affairs were limited to building and maintaining the physical structure on the land.<sup>74</sup> The court rejected their argument and concluded that "the affairs" of the enterprises included the financing of the project.<sup>75</sup> The Eighth Circuit has added some uncertainty to this issue. In *Bennett v. Berg*,<sup>76</sup> the en banc court stated that "[a] defendant's participation must be in . . . the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself." Unfortunately, the court only raised the issue and did not elaborate because it had not been raised by the defendant.<sup>77</sup>

"Employed or associated with" does not limit section 1962(c) only to defendants "who are . . . managers or employees in the colloquial sense . . . ."<sup>78</sup> Another court has stated that the mort-

rehearing, 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 104 S. Ct. 527 (1983); Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir.), cert. denied, 104 S. Ct. 509 (1983); Moss v. Morgan Stanley Inc., 719 F.2d 5, 17 (2d Cir.), petition for cert. filed, 52 U.S.L.W. 3473 (U.S. Dec. 8, 1983) (No. 83-950); Sutliff, Inc. v. Donovan Co., No. 83-1308 (7th Cir. Feb. 9, 1984); Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984). Two other cases contained allegations of multiple violations apparently including a violation of 1962(c). Bunker Ramo Corp. v. United States Business Forms, Inc., 713 F.2d 1272, 1286 (7th Cir. 1983); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983). Two cases arise apparently solely from allegations of 1962(a). Dan River, Inc. v. Icahn, 701 F.2d 278, 283 (4th Cir. 1983); Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.), cert. denied, 103 S. Ct. 177 (1982).

Five cases are brief dispositions of the RICO claims in which it is not clear that any specific subsection was alleged. Trane Co. v. O'Connor Sec., 718 F.2d 26 (2d Cir. 1983); Berns v. O'Dell, No. 83-1750 (8th Cir. Feb. 1, 1984); Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983); Gordon v. Terry, 684 F.2d 736 (11th Cir. 1983); Cullen v. Margiotta, 618 F.2d 226 (2nd Cir. 1980).

One case was unreported. Grayson v. Wooden, No. 80-5460 (6th Cir. Feb. 10, 1982).

73. Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981) (citations omitted).

74. *Id.* at 1155.

75. *Id.* The court supported its conclusion with a similar holding from a criminal RICO case. United States v. DePalma, 461 F. Supp. 778, 785-86 (S.D.N.Y. 1978) (initial financing of a theatre was part of the theatre's affairs).

76. 710 F.2d 1361, 1364 (8th Cir. 1983) (en banc).

77. *Id.*

78. Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir. 1983) (concluding that auditors and corporation with contract ties to the enterprise were sufficiently associated with the

gage lender and accountants of the enterprise were sufficiently associated with the enterprise.<sup>79</sup> This requirement appears to be a minimal obstruction in overcoming a motion to dismiss in a civil RICO suit.

Section 1962(a) is designed to prevent the investment of "dirty money" in the acquisition of an interest in an enterprise.<sup>80</sup> Section 1962(a) has been dispositive in only one reported civil RICO case. In *Municipality of Anchorage v. Hitachi Cable, Ltd.*,<sup>81</sup> the defendant had previously pleaded guilty to criminal mail and wire fraud counts. The plaintiff brought a motion for summary judgment. The motion was denied because although "the [plaintiff] asserts that the income [defendant] received could not conceivably have been used for any purpose not covered by RICO, it has presented no evidence to show what use was actually made of any income improperly derived."<sup>82</sup> In a criminal case, a court took the position that racketeering money indirectly invested into an enterprise was sufficient to show that defendant had violated section 1962(a).<sup>83</sup> None of the other reported civil cases in which a claim was raised under section 1962(a) discuss this requirement.<sup>84</sup>

Section 1962(b) makes it unlawful "to acquire or maintain . . . any interest in or control of any enterprise . . ."<sup>85</sup> Two reported cases have specifically addressed a separate allegation of 1962(b). Alleging use of the mails to obtain reissuance of stock was sufficient for the purposes of section 1962(b) because the predicate act resulted "in [the defendant's] acquisition of a greater interest in the [stock] than he otherwise would have."<sup>86</sup> The allegation of filing a series of fraudulent amendments in order to facilitate the acquisition of stock is sufficient to establish a violation of section

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enterprise).

79. *Bennett v. Berg*, 685 F.2d 1053, 1063 n.16, *aff'd on rehearing*, 710 F.2d 1361, 1365 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

80. 18 U.S.C. § 1962(a) (1982).

81. 547 F. Supp. 633 (D. Alaska 1982).

82. *Id.* at 644.

83. *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980).

84. *Maryville Academy v. Loeb Rhoades & Co.*, 530 F. Supp. 1061 (N.D. Ill. 1981); *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *Ingram Corp. v. J. Ray McDermott & Co.*, 495 F. Supp. 1321 (E.D. La. 1980); *Gitterman v. Vitoulis*, 564 F. Supp. 46 (S.D.N.Y. 1982). The relative scarcity of suits alleging a violation under section 1962(a) may be due to what one commentator states is the "extremely burdensome task" in tracing money back to a tainted source. Patton, *supra* note 20, at 403.

85. 18 U.S.C. § 1962(b) (1982).

86. *Erlbaum v. Erlbaum*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772, at 93,922 (E.D. Pa. July 13, 1982) (stock originally issued to plaintiff and defendant as joint tenants reissued only in the name of the defendant).

1962(b).<sup>87</sup>

Generally, it can be said that a defendant's contention that plaintiff made an insufficient allegation of RICO relationship will be unlikely to result in dismissal. As one commentator has stated, the defendant's argument in this area is generally "little more than an effort to touch all the bases in resisting the plaintiff's suit."<sup>88</sup>

#### D. *An Enterprise Engaged in Interstate Commerce*

##### 1. *Enterprise*

The element that must be properly alleged in any RICO claim is the existence of an enterprise. The definition of enterprise in section 1961 is open-ended.<sup>89</sup> Plaintiffs have successfully alleged that an "enterprise" includes: a city agency,<sup>90</sup> a city council,<sup>91</sup> a decedent's estate,<sup>92</sup> a corporation alone,<sup>93</sup> a corporation and associated individuals,<sup>94</sup> a limited partnership,<sup>95</sup> and an association of individuals.<sup>96</sup>

The United States Supreme Court has broadly construed "enterprise." In *United States v. Turkette*,<sup>97</sup> the narrow question the court faced was whether the "enterprise" element was confined to legitimate organizations, excluding an entity whose functions were entirely illegal. The court stated "There is no restriction upon the associations embraced by the definition: an enterprise includes any

87. *Spencer Cos., v. Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,216 (D. Mass. Nov. 17, 1981).

88. Blakey, *Reflections*, *supra* note 20, at 328.

89. 18 U.S.C. § 1961(4) (1982). For text of statute, see *supra* note 7. The definition of enterprise uses the word "includes" as opposed to the restrictive definition of racketeering activity which uses the word "means." *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982).

90. *State v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980).

91. *Teleprompter of Erie, Inc., v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981).

92. *Gunther v. Dinger*, 547 F. Supp. 25 (S.D.N.Y. 1982).

93. *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981) (complaint ambiguous as to what constituted an enterprise, but corporate defendant alone would satisfy the enterprise requirement).

94. *Computer Terminal Systems, Inc. v. Gross, Trade Cas.* 1982-1 (CCH) ¶ 64,531, at 72,946 (E.D.N.Y. 1981). *But see Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1151 (D.N.J. 1983) (plaintiff's failure to plead corporations and associated individuals act as legal entity fatal because such a combination could not be considered an association in fact of individuals).

95. *Eisenberg v. Gagnon*, 564 F. Supp. 1347 (E.D. Pa. 1983).

96. *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981). For an extensive list of all the types of business, government, and private groups that have been classified as enterprises in both civil and criminal cases, see Blakey, *Reflections*, *supra* note 20, at 298-300 nn.152-65.

97. 452 U.S. 576 (1981).

union or group of individuals associated in fact.”<sup>98</sup>

The First Circuit had rejected the notion that a “pattern of racketeering” could also be the “enterprise.”<sup>99</sup> The Supreme Court stated that “enterprise” and “pattern of racketeering” were separate elements, but “the proof used to establish these separate elements may in particular cases coalesce . . . .”<sup>100</sup> The proof necessary to the “enterprise” element can be established by “evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”<sup>101</sup>

The Supreme Court’s statement should have ended the uncertainty as to whether the “enterprise” requires proof distinct from the proof offered to establish a “pattern of racketeering activity.” However, in *Bennett*, the panel of judges concluded that “[b]y requiring proof of an ‘enterprise,’ RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering.”<sup>102</sup> The view more consistent with *Turkette* is that of the Second Circuit, which in a civil case<sup>103</sup> rejected the analysis in *Bennett*.

The Supreme Court’s use of the language “ongoing organization” and “continuing unit” have given lower courts more concepts to ponder, but the results indicate that varying constructions of “enterprise” can be read into the *Turkette* language. An example of a narrow view is given in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*,<sup>104</sup> where the court rejected plaintiff’s argument that a corporation was sufficiently alleged to be an ongoing organization because that interpretation “would . . . drastically expand federal jurisdiction over all business torts which involve use of the mails or telephones.”<sup>105</sup> Not surprisingly, the complaint was dismissed.<sup>106</sup> In *Kimmel v. Peterson*,<sup>107</sup> however, the

98. *Id.* at 580. The court declared that the definition of enterprise included two categories—legal entities and all other associations. *Id.* at 582.

99. *Id.* (quoting *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir. 1980)).

100. 452 U.S. at 583.

101. *Id.*

102. 685 F.2d 1053, 1060 (8th Cir. 1982), *aff’d on rehearing*, 710 F.2d 136 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983). The en banc court did not address this issue.

103. *Moss v. Morgan Stanley Inc.*, 719 F.2d at 22. *See also* *Austin v. Merrill Lynch, Inc.*, 570 F. Supp. 667, 669 n.2 (W.D. Mich. 1983). The Ninth Circuit has also rejected the *Bennett* approach in a criminal RICO case. *United States v. Bagnariol*, 665 F.2d 877, 890-91 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

104. 567 F. Supp. 1146 (D.N.J. 1983). The court found three elements necessary for a RICO enterprise: ongoing operation, continuing unit for common purpose, and separation between enterprise and racketeering activity. *Id.* at 1151-53.

105. *Id.* at 1152.

106. *Id.* at 1158.

107. 565 F. Supp. 476 (E.D. Pa. 1983).



court rejected the defendant's contention that a limited partnership brokerage service was not an ongoing organization for the reason that the partnership apparently rendered some legitimate product to customers.<sup>108</sup> It seems apparent that if the judge in *Kimmel* had been confronted with the *Seville* facts, he would have found some legitimate product was distributed and would have held that the "ongoing organization" requirement was satisfied. Likewise, the judge in *Seville* most likely would have found the *Kimmel* facts to be another garden variety business fraud outside the scope of RICO.

## 2. *Interstate Commerce*

In addition to alleging an enterprise, the plaintiff must allege a nexus with interstate commerce.<sup>109</sup> This requirement is satisfied if any activities (racketeering or otherwise) of the enterprise affect interstate commerce.<sup>110</sup> Courts usually reject arguments that no nexus is possible; mere receipt of supplies shipped into the state is sufficient to meet the requirement.<sup>111</sup> Even in a case where plaintiffs failed to allege interstate commerce the court refused to dismiss the complaint and allowed plaintiff to file an amended complaint.<sup>112</sup>

## III. ADDITIONAL ELEMENTS REQUIRED TO INVOKE CIVIL REMEDIES

The elements of RICO previously discussed are those necessary to establish a violation of section 1962. A violation of section 1962 is a prerequisite to either a civil or a criminal RICO case. In addition to those elements, a civil RICO plaintiff must also allege that (1) a person-victim (2) "was injured in his business or property" (3) "by reason of a violation of section 1962."<sup>113</sup> The element of person-victim is substantially similar to the element of person-defendant discussed previously.<sup>114</sup> Therefore, the focus here will be

108. *Id.* at 497.

109. 18 U.S.C. § 1962 (1982).

110. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983).

111. *See, e.g.,* *Meineke Discount Muffler Shops, Inc. v. Noto*, 548 F. Supp. 352, 354 (E.D.N.Y. 1982). *Cf. Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983) (proper to take judicial notice of the fact hospital purchases goods in interstate commerce).

112. *D'Iorio v. Adonizio*, 554 F. Supp. 223, 231 (M.D. Pa. 1982) (There is a "minimal criteria for finding a nexus.").

113. 18 U.S.C. § 1964 (1982).

114. Person is defined in 18 U.S.C. § 1961(3) (1982). The only possible difference between person-victim and person-defendant is that the prohibition (in some decisions)

on interpretations of the latter two elements.

Some district courts have construed the language of section 1964(c) authorizing trebles damages to require some type of competitive or commercial injury.<sup>115</sup> This restriction was initially adopted in order to prevent the transformation of "every bad faith breach of contract or common law fraud where a plaintiff alleges that defendants used the mails . . . into a RICO suit."<sup>116</sup>

Some of the later decisions restricting the civil RICO claim have focused on the phrase "by reason of."<sup>117</sup> These decisions would limit RICO recovery to those who suffer indirect harm (customers of the entity impacted by the predicate offense), as opposed to those directly harmed by the predicate offense. This language has been used to support arguments that Congress, by using language similar to that in an antitrust statute,<sup>118</sup> intended to limit RICO treble damages to some type of new claim (a violation of section 1962), not to supplement existing remedies for the predicate acts (the racketeering activity defined in section 1961).<sup>119</sup> This antitrust analysis has been rejected by courts<sup>120</sup> and commentators<sup>121</sup> because the purposes of antitrust regulation are distinct from the purposes of RICO, and because RICO does not create remedies solely for violations of predicate acts.<sup>122</sup>

against pleading the same entity as enterprise and person-defendant may not apply to situations where the person-victim is the enterprise. See *infra* text accompanying notes 17-39.

115. *N. Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980). Cf. *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208 (E.D. Mich. 1981) (requiring a "racketeering enterprise injury" which is not the same as competitive injury, but would overlap). In *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1137 (D. Mass. 1982), the court restricted application of RICO "to business loss from racketeering injuries."

116. *N. Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980).

117. *Erlbaum v. Erlbaum* [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982); *Noland v. Gurley*, 566 F. Supp. 210, 217-18 (D. Colo. 1983).

118. 15 U.S.C. § 15 (1982).

119. *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982). Cf. *Friedlander v. Nims*, 571 F. Supp. 1188 (N.D. Ga. 1983) (mere allegation of "damaged accordingly" does not satisfy causation requirement).

120. See, e.g., *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 678-80 (N.D. Ind. 1982); *Ralston v. Capper*, 569 F. Supp. 1575, 1579-80 (E.D. Mich. 1983) ("[A]nalogies to limitations in the antitrust context are entirely inappropriate here.").

121. See, e.g., *Horn, Judicial Plague Sweeps U.S.*, NAT'L L.J. May 23, 1983, at 19 ("The whole 'by reason of' argument is based on an absolutely tortured analogy to a Clayton Act case, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 447 (1977)."); *Patton*, *supra* note 20, at 415-16.

122. *Ralston v. Capper*, 569 F. Supp. 1575, 1579 (E.D. Mich. 1983) ("Nor is it true that a RICO 'fraud' claim is identical to a state common law fraud claim. There must be an enterprise, there must be an effect upon interstate commerce before RICO can come into

Other district courts have determined that RICO requires a narrow construction of "business or property" injuries, sometimes referred to as "racketeering injuries." The stated reason for doing so is to avoid "a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts."<sup>123</sup> Although this test, like the preceding competitive injury test, has been criticized<sup>124</sup> because it is never adequately defined, it also appears to be internally inconsistent. The rationale almost always offered in defense of these limitations is that the plaintiff does not allege any facts suggesting that this is the type of activity (i.e. organized crime) that Congress was seeking to combat.<sup>125</sup> One case, however, shows if this test were strictly applied, it would bar suits brought by those injured from criminal activity beyond the scope of garden-variety business fraud.

In *Gitterman v. Vitoulis*,<sup>126</sup> the plaintiff alleged that the defendants operated a carpet cleaning service as a front for the purpose of gaining entry into apartments, stealing diamonds, and replacing them with glass duplicates. It would seem to be a classic example of infiltration of a legitimate business by organized crime, with a person, enterprise, pattern, and a predicate offense. If the court had used the "by reason of" test, which disallows recovery for direct harm, the plaintiff who suffered the loss of jewelry would not have had standing to sue.<sup>127</sup> If the court had adopted a competitive or commercial injury test as defined in *North Barrington Development, Inc. v. Fanslow*,<sup>128</sup> this plaintiff would have lacked standing to sue because the loss did not impair any competitive economic ability.<sup>129</sup> Yet the court somehow determined that the racketeering enterprise injury test had been met, ostensibly because, although "the loss that the plaintiffs have alleged is purely

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effect, and there must also be two predicate offenses.").

123. *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982). As others have noted, a restriction to property injury should exclude at least personal injury. Patton, *supra* note 20, at 417; Parrish, *supra* note 20, at 344. In *Hamman v. United States*, 267 F. Supp. 420, 432 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968), the court excluded personal injury damages in an antitrust suit.

124. See, e.g., *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983).

125. See, e.g., *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643-44 (C.D. Cal. 1983).

126. 564 F. Supp. 46 (S.D.N.Y. 1982).

127. *Id.* at 49. Perhaps an insurance company that paid a claim to the person who suffered the loss should have standing to sue. See Parrish, *supra* note 20, at 357.

128. 547 F. Supp. 207 (N.D. Ill. 1980).

129. *Id.* at 210-11. Perhaps if other carpet cleaners were able to allege loss of business because the defendants maintained artificially low prices in order to gain entry into apartments, those other carpet cleaners might have standing under a competitive injury requirement.

personal, the alleged impact of the activities that the plaintiffs ascribe to the defendants is not."<sup>130</sup> The court twisted the test it had given in a prior case<sup>131</sup> apparently because the particular facts were so obviously within the spirit and the letter of RICO.

An example of the proper application of the "by reason of" limitation is *Maryville Academy v. Loeb Rhodes & Co.*,<sup>132</sup> in which fraud was the alleged predicate offense. The damages claimed, however, were the expense and injury to reputation caused by the filing of a securities claim. Because the damages were caused by an intervening event (the frivolous securities claim) and not by the predicate offenses (the alleged fraud), the court held that the "by reason of" requirement was not satisfied.<sup>133</sup>

When defendants have argued either the "by reason of" or competitive injury or racketeering enterprise injury test to a circuit court, they have been uniformly rebuffed.<sup>134</sup> The "by reason of" language of section 1964 should be interpreted literally. Damages should be allowed for direct and indirect harm caused by conduct that amounts to a violation of section 1962.<sup>135</sup> The "business or property" phrase should do no more than exclude personal injury damages.<sup>136</sup>

A rather novel approach for restricting RICO is given in two district court decisions holding that the plaintiff must assert "probable cause to believe a crime has been committed."<sup>137</sup> It

130. *Gitterman*, 564 F. Supp. at 49. Later, however, the judge did adopt the narrow "by reason of" test. *Gitterman v. Vitoulis*, No. 82-5908 (RWS) (S.D.N.Y. Sept. 28, 1983) (order granting summary judgment).

131. *Alton v. Alton*, No. 82-795 (S.D.N.Y. July 9, 1982).

132. 530 F. Supp. 1061 (N.D. Ill. 1981). See also *Kirschner v. Cable/Tel Corp.* [Current] Fed. Sec. L. REP. (CCH) ¶ 99,589 (E.D. Pa. Nov. 14, 1983).

133. 530 F. Supp. at 1065-66.

134. *Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir.) ("In short, we believe, like most other courts, that the erection of a 'competitive' or 'indirect' injury barrier to RICO recovery comports with neither the plain language nor the central goal of the statute."), *cert. denied*, 104 S. Ct. 509 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir.) (affirming dismissal of a RICO count but not endorsing the district court's adoption of a "by reason of" test), *petition for cert. filed*, 52 U.S.L.W. 3473 (U.S. Dec. 8, 1983) (No. 83-950).

135. One other commentator has suggested use of a producing cause standard in applying the "by reason of" test. *Patton*, *supra* note 20, at 415-16. One court recently stated that "by reason of" creates a proximate cause test. *Seawell v. Miller Brewing*, 576 F. Supp. 424 (M.D.N.C. 1983).

136. See *supra* note 123.

137. *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1046-47 (D. Utah 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983). The judge in *Tracy Collins Bank* also believed that a complaint should contain a bill of particulars. 558 F. Supp. at 1045. Why this concept was introduced is something of a mystery.

would seem apparent that the legal issues surrounding civil RICO litigation are complex enough without including the intricacies of the fourth amendment.<sup>138</sup> If one wishes to impose requirements of specificity, other traditional civil procedures are available.

#### IV. THE APPLICATION OF RULE 9(b) TO CIVIL RICO

It is common for a civil RICO claim to be based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities. In such situations, "circumstances constituting fraud or mistake shall be stated with particularity."<sup>139</sup> In *Bennett v. Berg*,<sup>140</sup> the Eighth Circuit applied this rule to the complaint and concluded that certain allegations were sufficient, and others should be struck without prejudice.<sup>141</sup> The key was whether the complaint "identif[ied] the time, place and contents of the alleged misrepresentations with particularity."<sup>142</sup>

In a well-reasoned decision,<sup>143</sup> a district court ruled that a complaint sufficiently alleges the course of wrongdoing (arising from the predicate act of securities fraud) when it: (1) specifies the parties' roles in a securities transaction, (2) details the breaches of trust, and (3) alleges particular acts of omission and misrepresentation. The defendants had argued that the complaint must contain specific data about each security traded over a two-year period. Relying upon the rationale of a Ninth Circuit decision,<sup>144</sup> the court recognized that demanding such an amount of detail was inappropriate at the pleading stage before discovery was commenced.

Even in a case where the complaint inadequately alleged only that defendant used the mails to defraud the plaintiff, the court did not dismiss the complaint.<sup>145</sup> Instead, the court granted the plaintiffs the opportunity to commence discovery and amend their

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138. U.S. CONST. amend. IV. For a discussion of the concepts included within the probable cause requirement in criminal law, see W. LAFAVE, SEARCH AND SEIZURE §§ 3.1-3.7 (1978 & Supp. 1983). This new line of argument would propose a theory of probable cause that does not fit within the traditional rubric (i.e. probable cause to search, probable cause to arrest).

139. FED. R. CIV. P. 9(b).

140. 685 F.2d 1053 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 527 (1983).

141. *Id.* at 1062-63.

142. *Id.* at 1062 n.13.

143. *Kimmel v. Peterson*, 565 F. Supp. 476 (E.D. Pa. 1983). The case arose from the facts surrounding a series of investments by a doctor who had allegedly asked for safe investments and was instead sold a number of high-risk speculative issues.

144. *Gottreich v. San Francisco Inv. Corp.*, 552 F.2d 866 (9th Cir. 1977) (a non-RICO securities claim).

145. *Eaby v. Richmond*, 561 F. Supp. 131 (E.D. Pa. 1983).

complaint within sixty days.<sup>146</sup>

## V. STATUTE OF LIMITATIONS

RICO does not include a statute of limitations. Some commentators have suggested that federal courts apply the "nearest analogous federal statute."<sup>147</sup> Courts, however, have consistently applied the nearest state statute of limitations when confronted with the question in a civil RICO suit.<sup>148</sup> If a federal district court in Montana were to apply Montana law, it would likely use the two-year period for commencement of an action in fraud.<sup>149</sup> One federal court has stated that federal law, not state law, determines when the action accrues.<sup>150</sup>

## VI. VENUE

The first reported civil RICO case was dismissed for improper venue.<sup>151</sup> Thus, although the special provisions in RICO for venue<sup>152</sup> were intended to liberalize<sup>153</sup> the general venue provisions,<sup>154</sup> the prudent practitioner should be careful to plead the facts necessary to establish proper venue.

"Any civil [RICO] action . . . against any person *may* be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."<sup>155</sup> RICO also includes a provision for joining any party residing in any other district under certain circumstances.<sup>156</sup> Courts

146. *Id.* at 137-38. In a recent case, a court stated that plaintiff must plead which specific subsection of § 1962 has been violated. *Ralston v. Capper*, 569 F. Supp. 1575, 1581 (E.D. Mich. 1983).

147. Blakey & Gettings, *Basic Concepts*, *supra* note 20, at 1047. The authors believe that such a practice would maintain uniformity.

148. *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1353-54 (E.D. Pa. 1983); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 684-85 (N.D. Ind. 1982); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 232 (M.D. Pa. 1982); *Gilbert v. Bagley*, [Current] FED. SEC. L. REP. (CCH) ¶ 99,483 (M.D.N.C. Sept. 17, 1982).

149. MONT. CODE ANN. § 27-2-203 (1983).

150. *Gilbert v. Bagley*, [Current] FED. SEC. L. REP. (CCH) ¶ 99,483 (M.D.N.C. Sept. 17, 1982).

151. *King v. Vesco*, 342 F. Supp. 120 (N.D. Cal. 1972).

152. 18 U.S.C. § 1965 (1982).

153. See *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1281 (D. Del. 1978); *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1132 n.6 (D. Mass. 1982); *Eaby v. Richmond*, 561 F. Supp. 131, 139 (E.D. Pa. 1983).

154. 28 U.S.C. § 1391(b) (1982).

155. 18 U.S.C. § 1965(a) (1982) (emphasis added).

156. 18 U.S.C. § 1965(b) (1982) provides in part:

[When] it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district

have rejected the theory that the acts of one co-conspirator performed in a district will conclusively establish venue for all co-conspirators.<sup>157</sup> The sufficiency of evidence that must be alleged should not present a significant obstacle to obtaining venue in most cases. Courts have held that periodic phone calls<sup>158</sup> or mailing letters<sup>159</sup> into a district by a defendant were sufficient to establish venue.

## VII. REMEDIES

Although the possibility of securing a judgment for treble damages is undoubtedly the great spur behind most of the recent civil RICO actions, other attractive remedies such as attorneys' fees and injunctive relief are contained in the statute and may be available to private parties. Most of the appeals courts that have faced the issue of equitable relief have refused to rule whether the remedy is available to private parties.<sup>160</sup> Attorneys' fees appear to be available only upon judgment, not upon obtaining a favorable settlement.<sup>161</sup>

There is great uncertainty as to whether private parties are entitled to general equitable relief. Section 1964(a) grants broad equitable powers to district courts.<sup>162</sup> Section 1964(b) authorizes

of the United States by the marshal thereof.

157. For rejection of the conspiratorial theory of venue, see *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1281 n.5 (D. Del. 1978); *Eaby v. Richmond*, 561 F. Supp. 131, 140 n.2 (E.D. Pa. 1983).

158. *Eaby v. Richmond*, 561 F. Supp. 131, 141 (E.D. Pa. 1983). *But see* *Clement v. Pehar*, 575 F. Supp. 436, 443 n.5 (N.D. Ga. 1983).

159. *Haber v. Kobrin*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,259. (S.D.N.Y. June 3, 1983). *But see* *DeMoss v. First Artist Prod. Co.*, 571 F. Supp. 409, 411-12 (S.D. Ohio 1983) (adopts restrictive interpretation of "transacts his affairs" by analogizing to antitrust law and finds venue improper where it is based upon the mailing of fraudulent statements into the district).

160. *Bennett v. Berg*, 685 F.2d 1053, 1064-65 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 507 (1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982) (ruling that district court had granted preliminary injunction on basis of breach of fiduciary duty, not RICO violation); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290-91 (4th Cir. 1983); *Trane v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983).

District courts have also sidestepped this issue. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Tex. 1981); *Trane Co. v. O'Connor Sec.*, 561 F. Supp. 301 (S.D.N.Y.), *aff'd*, 718 F.2d 26 (2d Cir. 1983).

161. *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 911-13 (E.D.N.Y. 1983).

162. 18 U.S.C. § 1964(a) (1982) provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future

such relief in suits brought on behalf of the United States.<sup>163</sup> Section 1964(c) authorizes treble damages for private plaintiffs, but is silent with respect to injunctive relief.<sup>164</sup> The language of 1964(c) can be interpreted as providing monetary damages as an additional remedy for private plaintiffs,<sup>165</sup> or as limiting the remedy to monetary damages.<sup>166</sup>

One district court granted a temporary injunction,<sup>167</sup> but later stated it did so based on the traditional standards for obtaining relief.<sup>168</sup> Another court, in a strongly worded opinion, attacked the notion that equitable relief was available to private plaintiffs.<sup>169</sup> The latter court relied heavily upon the legislative history of RICO, which indicated that (1) section 1964(c) was added almost as an afterthought to section 1964(a) and (b); and (2) an amendment to RICO specifically authorizing private equitable relief was withdrawn by its sponsor.<sup>170</sup> A third court, which refused a request for an attachment order, stated the equitable remedies in RICO were designed to prevent violations, not secure judgments.<sup>171</sup> It appears that if a plaintiff wishes to secure injunctive relief, he should plead the traditional requirements, i.e. probability of succeeding on the merits, irreparable harm, balance of public interest and harm to others.<sup>172</sup>

In the only published case that analyzed the availability of attorney's fees under RICO, the court held that attorney's fees were available "only to a plaintiff who has obtained a final judgment on

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activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

163. 18 U.S.C. § 1964(b) (1982) provides:

The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

164. 18 U.S.C. § 1964(c) (1982).

165. Blakey & Gettings, *Basic Concepts*, *supra* note 20, at 1047.

166. *Kaushal v. State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983).

167. *Aetna Casualty & Sur. Co. v. Liebowitz*, No. 81-2616 (E.D.N.Y. Dec. 8, 1981) (order granting preliminary injunction).

168. *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983).

169. *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983).

170. *Id.* at 583.

171. *Ashland Oil, Inc. v. Gleave*, 540 F. Supp. 81, 85 (W.D.N.Y. 1982).

172. See *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 96-99 (6th Cir. 1982); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 29 (2d Cir. 1983).



the merits."<sup>173</sup> The plaintiff had first secured a temporary injunction and then a favorable settlement. The court rejected the theory that plaintiff, as a prevailing party, was entitled to attorney's fees because the language of section 1964 was more similar to section 4 of the Clayton Act<sup>174</sup> (which has been interpreted as requiring more than a favorable settlement for an award of attorney's fees)<sup>175</sup> than that of section 16 of the Clayton Act<sup>176</sup> (which has been interpreted as allowing attorney's fees upon the issuance of a preliminary injunction).<sup>177</sup> This decision has, however, been criticized as fundamentally incorrect because RICO was not designed to be burdened by the restrictive interpretations of the Clayton Act.<sup>178</sup> This issue will undoubtedly receive more judicial attention in the future as members of the bar become more familiar with RICO.

### VIII. CONCLUSION

Federal district court judges have shown a general reluctance to open the courts to the new RICO cause of action. The law, however, is in a state of flux. As the courts of appeals uniformly reject unduly restrictive interpretations of RICO, it seems clear that the remedy afforded private litigants under RICO is available for a very broad range of alleged wrongs.

Since no RICO case law has arisen in Montana, practitioners should draft complaints cautiously.<sup>179</sup> Where possible, the allegations should be framed in the alternative. For example, where more than one enterprise is involved, it would be wise to plead different enterprises in different counts. In a typical fraudulent transaction, a plaintiff could allege that the defendant's conduct

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173. *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 912-13 (E.D.N.Y. 1983).

174. 15 U.S.C. § 15(a) (1982) provides in part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

175. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469-69 (2d Cir. 1974).

176. 15 U.S.C. § 26 (1982) provides in part: "In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

177. *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203 (S.D.N.Y. 1979).

178. Flaherty, *Attorney Fee Denied in Civil RICO Settlement*, NAT'L L.J., Aug. 1, 1983, at 8 (quoting conversation with Professor Blakey).

179. The substance of this paragraph was delivered in an address by Irvin B. Nathan, A.B.A. National Institute, RICO: The Ultimate Weapon in Business and Commercial Litigation (Feb. 17, 1984).

violates both the federal mail<sup>180</sup> or wire<sup>181</sup> fraud statute, and the state deceptive practices law.<sup>182</sup> The complaint should reflect the criminality of the defendant's actions, and should specifically allege the elements of the crime that constitutes the predicate offense. When possible, the pleadings should show that the predicate acts were related to each other. Any facts demonstrating the causal connection between the violation of section 1962 and the injury should be included in the complaint. As a tactical consideration, an attorney should plead any other federal claims because the court may be less tempted to dismiss a RICO claim if federal jurisdiction would still exist. Although the availability of equitable relief in private suits is in question, the prayer for relief should include any appropriate equitable remedy in anticipation of further case law developments.

The restrictive interpretations of RICO were developed as a means of protecting "legitimate" businessmen whose conduct fits the plain meaning of the statute. This rationale is unpersuasive. A civil RICO judgment is based on criminal activity—the commission of a predicate offense. Honest entrepreneurs have little to fear from RICO. Good faith should be a defense to the multitude of RICO claims arising from fraud.<sup>183</sup> When frivolous suits present a significant problem, courts should impose existing civil sanctions<sup>184</sup> rather than change the substantive law. Any meaningful restriction of the breadth of civil RICO should emanate from Congress.

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180. 18 U.S.C. § 1341 (1982).

181. 18 U.S.C. § 1343 (1982).

182. MONT. CODE ANN. § 45-6-317 (1983).

183. *E.g.*, *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979).

184. FED. R. CIV. P. 11.

